ORIGINAL (4)

IN THE UNITED STATES SUPREME COURT

October 1998 Term

CASE NO. 98-9741

Supreme Court, U.S.
FILED
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THOMAS KNIGHT,
n/k/a Askari Abdullah Muhammed

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED (Restated)

I. WHETHER CERTIORARI RELIEF AS TO CLAIM OF DELAY SHOULD BE DENIED WHERE THE PETITIONER BENEFITTED FROM THE DELAY, AND NO CONFLICT WITH ANY OF THIS COURT'S OR ANY OTHER COURT'S PRECEDENTS HAS BEEN DEMONSTRATED.

II. WHETHER CERTIORARI REVIEW SHOULD BE DENIED WHERE THE STATE COURT'S HOLDING WAS IN ACCORDANCE WITH THIS COURT'S PRIOR PRECEDENTS, AND DID NOT INCREASE OR CHANGE THE SENTENCE FOR THE CRIMES HEREIN.

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The decision from which the petitioner seeks to invoke the discretionary review of this Court is reported as 721 So. 2d 287 (Fla. 1998), rehearing denied and revised opinion issued, 24 Fla. L. Weekly S135 (Fla. March 11, 1999).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. s. 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The issues presented in this capital case involve the Eighth and Fourteenth Amendments, as well as Article I, section 10 of the United States Constitution.

STATEMENT OF THE CASE AND FACTS

t case arises from direct appeal in the Florida

which affirmed the 1996 resentencing of the

ıth for the 1974 murders of Sydney and Lillian Gans.

reme Court found the following historical facts of

appeal, we related the following material facts:

> .ng at his place of business and parking in his space, Mr. Gans was approached by the who was carrying an automatic rifle and was -enter his automobile, to drive home and get and to drive to the bank and get $50,000. de the bank, Mr. Gans informed the president abduction. The police and FBI were alerted. ıen returned to his car with the money. He and shortly thereafter, were found shot to death, shots -- perforating through their necks -- n fired from the rear seat of the vehicle. Knight was apprehended and taken into custody l area about 2,000 feet from the Gans' vehicle. him buried in the dirt was an automatic rifle r bag containing $50,000. There were blood ıis pants.

8 So. 2d at 202. During the resentencing BI Agent Terry Nelson testified that he was .n all stages of the surveillance of the ısode. He arrived at City National Bank in an ır, and observed the Gans' Mercedes, with Mrs. g and a black male with a rifle across his lap the right rear. After Mr. Gans returned to ıe vehicle departed and followed a circuitous e heading toward an unpopulated area of south /.

ntarily lost sight of the Mercedes, and after contact, Nelson again lost sight of the

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So. 2d at 290.

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arrest, §921.141(5)(e); (4) the murders were committed for pecuniary gain, §921.141(5)(f); (5) the murders were especially heinous, atrocious, or cruel (HAC), §921.141(5)(h); and (6) the murders were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP), §921.141(5)(I). The trial court considered and rejected Knight's proffered statutory mental mitigators. In nonstatutory mitigation, the trial court found and gave weight to the fact that Knight was a victim of childhood abuse; that he suffered from some degree of paranoia; and that he was raised in poverty. Knight v. State, 721 So. 2d at 302 n.1.

With respect to the CCP aggravating factor, at issue in the instant proceedings, the trial judge had further found that, "even in the absence of this aggravating circumstance, the court's analysis and conclusions herein would not change." (S.R. 11, n.9). The trial judge had further concluded that: "The aggravating circumstances in this case far outweigh the mitigating circumstances. The mitigating factors pale when compared to the aggravators herein." (S.R. 38).

On direct appeal, the Florida Supreme Court affirmed the sentences of death, having invalidated the HAC circumstance but finding the error to be harmless beyond a reasonable doubt. 721

So. 2d at 298-99. With respect to the claim as to the CCP aggravator before this Court, the Florida Supreme Court held: "As Knight acknowledges, we have previously determined that application of the CCP aggravator in this situation is not an ex post facto violation. Combs v. State, 403 So. 2d 418 (Fla. 1981)." 721 So. 2d at 297.

With respect to the first claim of delay in execution raised in the instant proceedings, it should be noted that Petitioner was first tried, convicted of the instant crimes, and sentenced to death in 1975. 721 So. 2d at 302. The Florida Supreme Court affirmed the convictions and sentences on direct appeal in 1976. Knight v. State, 338 So. 2d 201 (Fla. 1976). Thereafter, the Petitioner filed a state petition for writ of habeas corpus, raising ineffective assistance of appellate counsel issues. 721 So. 2d at 290. The petition was denied, upon a finding that appellate counsel had not been ineffective. Knight v. State, 394 So. 2d 997 (Fla. 1981).

In the interim, Petitioner also fatally stabbed a prison guard, Officer James Burke, while on death row, on October 12, 1980. Petitioner, having been denied a visitor's pass for failure to follow prison regulations, had announced that he would have to start "sticking people." Petitioner had then stabbed Burke, who

had no prior involvement with him, with a knife made from a sharpened serving spoon. Petitioner was convicted and sentenced to death for this crime as well. The conviction and sentence of death were affirmed by the Florida Supreme Court on direct appeal. Muhammad v. State, 494 So. 2d 969, 970 (Fla. 1986), cert. denied, 479 U.S. 1101 (1987).

After the Governor signed a warrant for the Gans murders, Knight filed a federal habeas petition and a motion for stay of execution in the federal district court. The district court granted the stay, retained jurisdiction on the habeas petition, and ordered Knight to exhaust his state law claims. 721 So. 2d at 290. Petitioner thus filed a motion for post-conviction relief in the state trial court which was summarily denied, and on appeal the denial was affirmed. Muhammad v. State, 426 So. 2d 533 (Fla. 1982), cert. denied, 464 U.S. 865, (1983). In said post-conviction proceedings, the Petitioner had raised six (6) issues with respect to the guilt phase, two (2) issues with respect to the penalty phase - that the imposition of the death penalty was racially discriminatory and arbitrary, and ineffective assistance of trial counsel issues. 426 So. 2d at 535-36. Petitioner then returned to the federal district court. That court also denied his claims, after conducting an evidentiary hearing. Knight v. Dugger, 863 F. 2d 705, 707 (11th Cir. 1988).

In the interim between the district court's denial of habeas relief and the Petitioner's appeal of that denial to the Eleventh Circuit Court of Appeals, this Court issued its decision in Hitchcock v. Dugger, 481 U.S. 393 (1987). Knight v. Dugger, 863 F. 2d at 708. In Hitchcock, this Court invalidated Florida's standard jury instructions with respect to nonstatutory mitigation during the penalty phase. The Eleventh Circuit Court of Appeals thus affirmed denial of habeas relief with respect to every post-conviction claim raised by the Petitioner, but reversed the sentence of death based upon the change of law in Hitchcock. Knight v. Dugger, 865 F. 2d at 759 (Clark, J., specially concurring)("We reverse only with respect to the Hitchcock issue. The law governing Florida's jury instructions on nonstatutory mitigating circumstances has changed since the district court's opinion and judgment. This necessitates reversal.").

Resentencing proceedings thus began in the state trial court. The Petitioner, aside from litigating a multitude of issues, took several continuances on various grounds prior to the 1996 resentencing. Immediately prior to the commencement of resentencing, the Petitioner then filed a motion to preclude the death penalty on the ground of delay. The Petitioner claimed that, the "14 year" delay between the original 1975 trial and the reversal based upon Hitchcock in 1989, was attributed to the State.

On this basis, the Petitioner claimed that his execution, after he has been incarcerated for more than 20 years, was cruel and unusual punishment, in reliance upon Lackey v. Texas, 514 U.S. 1045 (1995) (memorandum of Stevens, J., with respect to denial of certiorari). He relied upon the "inherent suffering" of incarceration under a death sentence and, that retribution and deterrence purposes are no longer served. No factual circumstances pertaining to the Petitioner's own situation on death row nor any particularized suffering by Petitioner were presented. The trial court thus summarily rejected the claim. On direct appeal, the Petitioner raised the same claim which was rejected by the court below on the grounds that, (a) the claim of delay, where both parties were responsible for delays, had been rejected by every court that had previously considered it; and, (b) Petitioner was not entitled to relief, even if the claim was meritorious, as Petitioner was subject to another separate and valid death sentence for the Burke murder:

> Finally, Knight claims that to execute him after he has already endured more than two decades on death row is unconstitutionally cruel and unusual punishment. He also argues that Florida has forfeited its right to execute Knight under binding norms of international law. Although Knight makes an interesting argument, we find it lacks merit. As the State points out, no federal or state courts have accepted Knight's argument that a prolonged stay on death row constitutes cruel and unusual punishment, especially where both parties bear responsibility for the long delay. *See, e.g., White v. Johnson*, 79 F. 3d 432 (5th Cir. 1996); *State v. Smith*, 280 Mont. 158, 931 P.2d 1272 (Mont. 1996). We also note that the Arizona Supreme Court recently rejected this

precise claim. *See State v. Schackart*, 190 Aria. 238, 947 P.2d 315, 336 (Ariz. 1997) (finding "no evidence that Arizona has set up a scheme prolonging incarceration in order to torture inmates prior to their execution"), *cert. denied*, ___ U.S. ___, 119 S.Ct. 149, ___ L. Ed. 2d ___ (1998). Second, we also consider that irrespective of the status of this case, Knight has been and will remain incarcerated on death row for his 1980 murder of officer Burke until that case is finalized. We similarly reject Knight's claim under international law.

721 So. 2d at 300.

REASONS FOR DENYING THE WRIT

I.

CERTIORARI RELIEF AS TO CLAIM OF DELAY SHOULD BE DENIED WHERE THE PETITIONER BENEFITTED FROM THE DELAY, AND NO CONFLICT WITH ANY OF THIS COURT'S OR ANY OTHER COURTS' PRECEDENTS HAS BEEN DEMONSTRATED.

The Petitioner's claim of delay, as presented to the state courts, was properly rejected on the grounds that: (a) where both parties are responsible for delays, the Eighth and Fourteenth Amendment challenges herein have been rejected by every court which has addressed the issue; and, (b) Petitioner would not be entitled to relief, even if the claim was meritorious, as he is subject to another separate and valid death sentence for the Burke murder. Knight v. State, 721 So. 2d at 300. The lower court relied upon the well reasoned decisions of federal and state courts which have rejected Petitioner's claims. See McKenzie v. Day, 57 F.3d 1461, 1466-67 (9th Cir.), adopted en banc, 57 F. 3d 1493 (9th Cir. 1995), cert. denied, (1995) (delay in carrying out execution benefits inmates and is, "a consequence of our evolving standards of decency, which prompt us to provide death row inmates with ample opportunities to contest their convictions and sentences."); see also Chambers v. Bowersox, 157 F.3d 560, 570 (8th Cir. 1998), cert.denied, 119 S.Ct. 2383 (1999) ("But delay, in large part, is a function of the desire of our courts, state and federal, to get it right, to explore exhaustively, or at least sufficiently, any

argument that might save someone's life. Chambers's strongest argument is that the State has had to try him three times before getting it right. That is true, but there is no evidence, not even a claim, that the State has deliberately sought to convict Chambers invalidly in order to prolong the time before it could secure a valid conviction and execute him. We believe the State has been attempting in good faith to enforce its laws. Delay has come about because Chambers, of course with justification, has contested the judgments against him, and, on two occasions, has done so successfully. . . . we do not see how the present situation even begins to approach a constitutional violation. Petitioner's argument is without merit."); White v. Johnson, 79 F.3d 432, 439 (5th Cir. 1996), cert. denied, 519 U.S. 911,(1998) (same); Stafford v. Ward, 59 F.3d 1025, 1028 (10th Cir. 1995), cert. denied, 515 U.S. 117 (1995) (same).

Likewise, the state courts have also rejected the claim, holding: "[i]f an Eighth Amendment challenge based on delay were to prevail, then the procedures designed to provide a fair adjudication in death penalty cases would in themselves be used to ultimately defeat their own purposes." State v. Smith, 931 P.2d 1272, 1288 (Mont. 1996), cert. denied, 118 S. Ct. 410 (1997); see also Ex Parte Bush, 695 So. 2d 138, 139-40 (Ala.), cert. denied, 118 S. Ct. 418 (1997); Arizona v. Schackart, 947 P.2d 315, 336 (Ariz. 1997)(en banc), cert. denied, 119 S. Ct. 149 (1998); Hill v.

State, 962 S.W.2d 762, 767 (Ark.), cert. denied, 119 S. Ct. 145 (1998); People v. Frye, 959 P.2d 183, 262-64 (Cal. 1998), cert. denied, 119 S. Ct. 1262 (1999); State v. Moore, 591 N.W.2d 86, 93-95 (Neb. 1999); State v. Chinn, 1997 WL 464736 (Ohio Ct. App. 1997); Bell v. State, 938 S.W.2d 35, 53 (Tex. Crim. App. 1996), cert. denied, 118 S. Ct. 90 (1997). The courts have also rejected claims with respect to the deterrent effect of the death penalty after a long delay. State v. Smith, 931 P.2d at 1288 ("The United States Supreme Court has recognized, however, that 'the value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures.' Gregg, 428 U.S. at 186."). Accordingly, certiorari relief is not appropriate with respect to the instant claims as no conflict with any of this Court's precedents, nor with any federal or other state courts' precedents has been demonstrated. Moreover, adjudication of the claim would not even benefit the Petitioner, as he is subject to another separate and valid sentence of death for the murder of a corrections officer while on death row.

The Petitioner's original trial and sentencing took place in 1975. He successfully obtained federal habeas corpus relief on appeal, based only upon the change of law in Hitchcock v. Dugger, 481 U.S. 393 (1987), from the Eleventh Circuit Court of Appeals in 1989. See Knight v. Dugger, 863 F.2d 705 (1988). It should be

noted that after the completion of direct appeal proceedings in 1976, the Petitioner had pursued multiple state post-conviction proceedings and filed a federal petition for writ of habeas corpus, raising in large part ineffective assistance of trial and appellate counsel claims.[1] All of the state courts and the federal District Court denied relief on said claims. After the denial of federal habeas relief by the District Court in 1987, this Court issued its opinion in Hitchcock v. Dugger, 481 U.S. 393 (1987), which invalidated Florida's prior standard jury instructions with respect to consideration of non-statutory mitigating factors. The Eleventh Circuit, on appeal from denial of habeas relief from the District Court, affirmed all of the ineffective assistance of counsel claims previously pursued by the Petitioner. The federal court of appeals reversed the case for resentencing based only upon the change of law in Hitchcock. 865 F.2d at 759 (Clark, J., specially concurring) ("We reverse only with respect to the Hitchcock issue. The law governing Florida's jury instructions on non-statutory mitigating circumstances has changed since the district court opinion and judgment. This necessitates reversal").[2]

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[1] See Knight v. State, 394 So. 2d at 997-1003; Muhammad v. State, 426 So. 2d at 533-39; Knight v. Dugger, 863 F.2d at 710-758.

[2] See also Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987)("We find that the United States Supreme Court's consideration of Florida's capital sentencing statute in its Hitchcock opinion represents a sufficient change in the law..., to defeat the claim of a procedural default.").

In the state courts, the Petitioner then claimed that, the "14 year" delay between the original 1975 trial and the reversal based on Hitchcock in 1989, was attributable to the state. On this basis, the Petitioner claimed that his execution, after he has been incarcerated for more than 20 years, was cruel and unusual punishment, in reliance upon Lackey v. Texas, 514 U.S. 1045 (1995)(memorandum of Stevens, J. respecting denial of certiorari). He relied upon the "inherent suffering" of incarceration under a death sentence and, that retribution and deterrence purposes are no longer served. As noted previously, no factual premise pertaining to the circumstances of Petitioner's own incarceration or suffering were presented to the state courts. Thus, to the extent that Petitioner may be relying on such circumstances,[3] said claim was not fairly presented to the state court and is thus not a proper basis for certiorari relief. See Street v. New York, 394 U.S. 576, 582-83 (1969) (where an issue is not presented to state courts in such a manner that it was necessarily decided by the highest state court, the United States Supreme Court would not consider the issue); Taylor v. Freeland & Kronz, 503 U.S. 638, 645 (1992)("In addition, we have said that 'ordinarily, this Court does not decide questions not raised or resolved in the lower court[s].' Youakim v. Miller, 425 U.S. 231, 234, 47 L. Ed. 2d 701, 96 S. Ct. 1399 (1976)(per curiam). These principles help to maintain the

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[3] See petition at pp. 17-20.

integrity of the process of certiorari.");[4] see also Janecka v. Texas, 937 S.W.2d 456, 476 (Tex. 1997) (en banc), cert. denied, 118 S. Ct. 86 (1997) (Eighth Amendment claim based upon 15-year delay and attendant "psychological stress" deemed to be waived for failure to establish a factual predicate in the trial court).

With respect to the merits of the claim, as presented to the state courts, the lower court relied upon the well reasoned precedent in State v. Smith, 931 P.2d at 1287-88, which includes a

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[4] As noted previously, Petitioner's claim of delay herein was first presented, ore tenus, immediately prior to the resentencing. (T. 7-13). The written motion with respect to said claim was filed after the commencement of resentencing, on February 7, 1996. (R. 1436-58). No factual premise with respect to Petitioner's own physical or psychological circumstances on death row were related or relied upon in either the oral or written presentation of the instant claim. Id. No evidence with respect to the "X wing," now relied upon by the Petitioner, was presented. Id. Indeed, contrary to the Petitioner's representations herein, the record, in the context of other claims not at issue herein, reflects that the Petitioner did not have extensive disciplinary problems when he was first placed on death row for the Gans murders in 1975. It was after the Petitioner murdered corrections officer Burke, while on death row, in October, 1980, that Petitioner was placed in "Q wing" (secure solitary confinement). (T. 3535-37; 2270-71). Petitioner was taken out of Q wing and placed with regular death row inmates in 1989, more than 7 years prior to the resentencing. (T. 3536). It should be noted that, apart from the Burke murder, Petitioner had amassed 543 disciplinary reports; the average number of disciplinary reports for a death row inmate in a ten (10) year period was "5 or 6." (T. 3537; 3549-50). In any event, again contrary to the Petitioner's claim herein, the record further reflects that while on death row with other such inmates prior to resentencing, the Petitioner had a television in addition to regular access to legal, religious and fictional literature in his cell. (T. 3538-39). He also regularly played chess with other inmates (T. 3539-40), and had yard privileges. (T. 2296).

comprehensive summary of the legal landscape in rejecting the claim, as follows:

> At the time of the oral argument in this appeal, Smith had spent approximately thirteen years on death row and had four sentencing hearings. In arguing that his execution after such a long period of incarceration would amount to cruel and unusual punishment, he relies on Lackey v. Texas, 514 U.S. 1045, 115 S. Ct. 1421. 131 L.Ed. 2d 304 (1995).
>
> ***
>
> Justice Stevens' memorandum in connection with the Court's denial of certiorari cannot be construed as a controlling decision on this issue and has not been regarded favorably in the federal courts. In McKenzie v. Day, 57 F.3d 1461, adopted en banc, 57 F.3d 1493 (9th Cir. 1995), Duncan McKenzie attempted to obtain a stay of his execution by showing the likely success of his claim that the twenty-year delay in his execution was cruel and unusual. The Ninth Circuit Court of Appeals denied the stay of execution. The court stated, "we conclude that it is highly unlikely that McKenzie's Lackey claim would be successful if litigated to its conclusion." McKenzie, 57 F.3d at 1467. The court reasoned that the cause for the delay in carrying out McKenzie's sentence was that "McKenzie has availed himself of procedures our law provides to ensure that executions are carried out only in appropriate circumstances." McKenzie, 57 F.3d at 1466-67. Thus, the court reasoned, the delay was "a consequence of our evolving standards of decency, which prompt us to provide death row inmates with ample opportunities to contest their convictions and sentences." McKenzie, 57 F.3d at 1467. The court recognized the ultimate irony and lack of logic in the Lackey claim: If an Eighth Amendment challenge based on delay were to prevail, then the procedures designed to promote fair adjudication in death penalty cases would in themselves be used to ultimately defeat their own purpose. See also White v. Johnson, 79 F.3d 432 (5th Cir. 1996), and Stafford v. Ward, 59 F.3d 1025 (10th Cir. 1995).

In White, the Fifth Circuit Court of Appeals reasoned:

> [T]here are compelling justifications for the delay between conviction and the execution of a death sentence. The state's interest in

> deterrence and swift punishment must compete with its interest in insuring that those who are executed receive fair trials with constitutionally mandated safeguards. As a result, states allow prisoners such as White to challenge their convictions for years. White, 79 F.3d at 439.

It is clear from the record in this case that Smith has benefitted from the appellate and federal review process of which he has availed himself and which has resulted in the delay and the multiple sentencing hearings in this case. We hold that Smith has not established violation of his right to due process or his right to be free from cruel and unusual punishment as a result thereof.

Smith further argues that imposition of the death penalty after a long delay cannot have any deterrent effect. The United States Supreme Court has recognized, however, that "the value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures." Gregg, 428 U.S. at 186, 96 S.Ct. at 2931. Accordingly, this argument should be presented to the Montana Legislature, not to this Court.

See also White v. Johnson, 79 F.3d at 437 ("As a panel of this Court noted in Fearance v. Scott, federal courts have encountered the claim that prolonged incarceration before execution is cruel and unusual punishment for decades. [cite omitted]. To date, no federal court has recognized such a theory of cruel and unusual punishment."); Chambers, 157 F. 3d at 570; Ex Parte Bush, 695 So. 2d at 139-40; Frye, 959 P.2d at 262-64; Moore, 591 N.W. 2d at 93-95; Chinn, 1997 WL 464736 at *1-2; Bell, 938 S.W. 2d at 53.

In the instant case, the 14 year delay between the original conviction and sentence of death in 1975 and the reversal for

resentencing by the Eleventh Circuit Court of Appeals in 1989, benefitted the Petitioner. He obtained relief based upon the change of law in Hitchcock which occurred in 1987. Moreover, the argument that the imposition of the death penalty after a long delay does not have any deterrent effect, is also without merit, as that is an issue to be resolved by the legislatures and not the courts. As recognized by this Court, "the value of capital punishment as deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures." Gregg v. Georgia, 428 U.S. 153, 186 (1976). Thus, as noted previously, no conflict with any precedent from this Court or other federal and state courts has been demonstrated. Additionally, the Petitioner is under another separate and valid sentence of death for the Burke murder. The Respondent thus respectfully submits that certiorari relief should be denied.

II.

CERTIORARI REVIEW SHOULD BE DENIED WHERE THE STATE COURT'S HOLDING WAS IN ACCORDANCE WITH THIS COURT'S PRIOR PRECEDENTS, AND DID NOT INCREASE OR CHANGE THE SENTENCE FOR THE CRIMES HEREIN.

Petitioner argues that the use of the amended aggravating factor of cold, calculated and premeditated (CCP) at his resentencing constitutes an ex post facto application of the law. The Respondent respectfully submits that certiorari review is not

appropriate with respect to this claim, as the state court's rejection of Petitioner's argument is in conformity with the well established precedents of this Court. See Collins v. Youngblood, infra; California Department of Corrections v. Morales, infra; Lynce v. Mathis, infra. The use of the complained of amended aggravator neither increased nor made more burdensome the punishment for Petitioner's crimes, so as to constitute an ex post facto violation. Moreover, the record herein affirmatively reflects that the result of the resentencing in the instant case would have been the same even absent the complained of amended aggravator. The Petitioner was sentenced to death previously without the use of the complained of aggravator herein. At resentencing, the sentencer, having found four (4) other valid aggravators, expressly held that, "even in the absence of this aggravating circumstance [CCP], the court's analysis and conclusions herein would not change." (SR. 11, n. 9).[5]

In Collins v. Youngblood, 497 U.S. 37, 50-51 (1990), this

[5] Apart from the complained of aggravator herein, the trial court found the following four (4) aggravators applicable: 1) prior violent felonies - the unrelated murder of corrections officer Burke, in addition to the contemporaneous double murder herein; 2) murder committed during the course of a kidnaping; 3) murder committed to avoid arrest; and, 4) murder committed for pecuniary gain. The trial court found three nonstatutory mitigating factors: 1) defendant was abused as a child; 2) he suffers from some degree of paranoia; and, 3) defendant was raised in poverty. The trial court concluded that: "the mitigating factors pale when compared to the aggravators herein." (SR2-38).

Court reviewed its ex post facto jurisprudence, overturned two of its precedents, Kring v. Missouri, 107 U.S. 221 (1883) and Thompson v. Utah, 170 U.S. 343 (1898), and cited with approval the formulation in an earlier decision, Beazell v. Ohio, 269 U.S. 167 (1925):

> "It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto. Id. at 169-170, 46 S. Ct. at 68-69."
>
> . . .
>
> The Beazell formulation is faithful to our best knowledge of the original understanding of the Ex Post Facto clause: Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts.

497 U.S. at 42-43; see also California Dept. Of Corrections v. Morales, 514 U.S. 499, 506 n.3 (1995) ("After Collins, the focus of the ex post facto inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage' . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable"); Lynce v. Mathis, 519 U.S. 433, 441 (1997) (for a law to "fall within the *ex post facto* prohibition . . . it 'must disadvantage the offender affected by it' by altering the definition of criminal conduct or

increasing the punishment for the crime.").

In the instant case, Petitioner's challenged statutory provision neither punished as a crime an act previously done which was innocent when done, nor made more burdensome the punishment for a crime after its commission, nor did it deprive one charged with crime of any defense available at the time when the act was committed.

The state court below, in rejecting the Petitioner's claim of ex post facto violation, relied upon its prior precedent in Combs v. State, 403 So. 2d 418 (Fla. 1981), cert. denied, 456 U.S. 984 (1982). Knight v. State, 721 So. 2d at 297. The state court in Combs construed Florida's capital sentencing statute in effect at the time of the commission of the crimes herein, to have encompassed and authorized the consideration of the factual circumstances and elements of the crime, including the cold, calculated and premeditated mode of commission of the crimes, at issue herein. The state court had thus held that the subsequent amendment of the statutory scheme to include a specific aggravating factor of "cold, calculated, premeditated" circumstance did not constitute the addition of a "new" aggravating factor, but that the amendment merely inured to the benefit of the defendant by adding limitations to the use of the elements of the crime for

aggravation purposes:

> We find no error in the application of section 921.141(5)(I), Florida Statutes, which became effective July 1, 1979, adding as an aggravating circumstance:
>
> > (I) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
> >
> > If the legislature had added an entirely new factor as an aggravating circumstance, then retroactive consideration would have violated the prohibition against ex post facto laws as set forth in Weaver v. Graham, --- U.S. ---, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981), and in State v. Williams, 397 So. 2d 663 (Fla. 1981). However, the addition by the legislature of paragraph (I) to section 921.141(5), in fact only reiterates in part what is already present in the elements of premeditated murder, with which petitioner was charged and which the evidence clearly supports. Although consideration of aggravating factors must be limited to those set forth in ye statute, Elledge v. State, 346 So. 2d 998 (Fla. 1977); Purdy v. State, 343 So. 2d 4 (Fla.), cert. denied, 434 U.S. 847, 98 S. Ct. 153, 54 L. Ed. 2d 114 (1977); the elements of the specific offense charged are and must be inherently part of the circumstances taken into consideration when imposing a sentence in a capital case as well as in other criminal cases. As Justice Adkins stated in State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1951, 40 L. Ed. 2d 295 (1974):
> >
> > The aggravating circumstances . . . actually define those crimes when read in conjunction with Fla. Stat. ss 782.04(1) (homicide statute) and 794.01(1) (former rape statute), F.S.A. to which the death penalty is applicable in the absence of mitigating circumstances.
> >
> > What, then, does paragraph (I) add to the

> statute? In our view, it adds the requirement that in order to consider the elements of a premeditated murder as an aggravating circumstance, the premeditation must have been "cold, calculated and . . . without any pretense of moral or legal justification." Paragraph (I) in effect adds nothing new to the elements of the crimes for which petitioner stands convicted but rather adds limitations to those elements for use in aggravation, limitations which inure to the benefit of a defendant.

Combs, 403 So. 2d at 421 (emphasis added). The Florida Supreme Court reaffirmed its position that the "cold, calculated, premeditated" aggravating factor, "did not change the substance of the sentencing law to the detriment of capital offenders," in Justus v. State, 438 So. 2d 358, 368 (Fla. 1983), cert. denied, 465 U.S. 1052 (1984); see also Zeigler v. State, 580 So. 2d 127, 130 (Fla.), cert. denied, 502 U.S. 946 (1991); Sireci v. State, 587 So. 2d 450, 454 (Fla. 1991), cert. denied, 503 U.S. 946 (1992) (same); Hall v. State, 614 So. 2d 473, 478 (Fla.), cert. denied, 510 U.S. 834 (1993) (same); Trotter v. State, 690 So. 2d 1234, 1237 (Fla. 1996), cert. denied, 522 U.S. 876 (1997) (enactment of community control/custody aggravator was not a substantive change in law and did not constitute an ex post facto violation, where community control addition merely refined the previously existing sentence of imprisonment aggravator).

In support of the above position, the Respondent would additionally note that another statutory aggravating circumstance,

heinous, atrocious and cruel (HAC), which was in effect at the time of the commission of the instant crimes, also specifically encompassed and included, a "cold, calculated design to kill," at the time. Alvord v. State, 322 So. 2d 533, 540 (Fla. 1975), cert. denied, 428 U.S. 923 (1976). The Florida Supreme Court, with respect to crimes committed at the time of the instant crimes and prior to the enactment of the CCP aggravating factor in 1979 at issue herein, had expressly held that the HAC aggravating circumstance in effect at the time applied to killings "inflicted in a 'cold and calculating' or 'execution-style' fashion." Vaught v. State, 410 So. 2d 147, 151 (Fla. 1982), (citing Magill v. State, 386 So. 2d 1188 (Fla. 1980), cert. denied, 450 U.S. 927 (1981)); Alvord v. State, supra; and, Sullivan v. State, 303 So. 2d 632 (Fla. 1974), cert. denied, 428 U.S. 911 (1976).[6]

The enactment of the cold, calculated, premeditated circumstance as a separate aggravating factor in 1979 then merely led to limitations in the consideration of the factual circumstances of the crime in aggravation. Thus, as noted by the Petitioner, this aggravating factor at the time of the resentencing

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[6] The State would note at the original trial herein, the HAC aggravator was applied and upheld on appeal. Knight v. State, 338 So. 2d at 208. At the resentencing, despite having characterized the crimes as "execution-style killings," the Court below invalidated the application of the HAC aggravator in light of the limitations to the HAC factor which had occurred since the time of the original trial. Knight v. State, 721 So. 2d at 299.

required considerably more than what was required at the time of the original trial. See Jackson v. State, 648 So. 2d 85, 89 (Fla. 1996), petition at p. 29. The limitations inured to the benefit of the defendant.

In sum, the "cold, calculated design" or "execution-style" of committing the crime, was permissible aggravation in the statutory scheme in effect at the time of the commission of the instant crimes. The subsequent amendment of the statute to include a separate aggravator of "cold, calculated, premeditated" circumstance, merely led to additional judicial limitations which inured to the defendant's benefit. As such, there was no ex post facto violation, as the amendments did not affect the definition of the crimes herein or the punishment therefore, in conformity with this Court's prior precedents. Certiorari relief should thus be denied.

CONCLUSION

Based on the foregoing, the Respondent respectfully requests that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONSE TO PETITION FOR A WRIT OF CERTIORARI** was furnished by U.S. Postal Service, first class mail, postage prepaid, to **BETH C. WEITZNER, and LOUIS CAMPBELL** Assistant Public Defenders, Eleventh Judicial Circuit of Florida, 1320 N.W. 14th Street, Miami, Florida 33125 on the 10th day of August, 1999.

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